ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEWAINE POINDEXTER	:	
Petitioner	:	No. 87-7311
vs.	:	
THE STATE OF OHIO	:	
Respondent	:	

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Arthur M. Ney, Jr.
Prosecuting Attorney

Christian J. Schaefer
Assistant Prosecuting Attorney
(Counsel of Record)

420 Hamilton County Courthouse
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. MUST AN APPELLATE COURT CONSIDER AN ERROR WHICH A PARTY COMPLAINING OF THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL TO THE ATTENTION OF THE TRIAL COURT AT A TIME WHEN SUCH ERROR COULD HAVE BEEN CORRECTED OR AVOIDED?

II. DOES THE CONSTITUTION OF THE UNITED STATES REQUIRE REVIEWING COURTS TO BECOME IMGREGNABLE CITADELS OF TECHNICALITY MANDATING REVERSAL FOR EVERY CLOSING ARGUMENT OF A PROSECUTOR WHICH QUOTES THE CALMLY REASONED EXPLANATION OF THE LATE JUSTICE POTTER STEWART FOR THE DEATH PENALTY?

III. DOES A JURY INSTRUCTION WHICH ACCURATELY SETS OUT THE FUNCTION OF AN OHIO JURY IN THE PENALTY PHASE OF A CAPITAL CASE VIOLATE THE UNITED STATES CONSTITUTION?

IV. DOES THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE SUPREME COURTS OF THE SEVERAL STATES FROM SUMMARILY DISPOSING OF ISSUES WHICH HAVE PREVIOUSLY BEEN RAISED, CONSIDERED, AND DECIDED BY THE STATE SUPREME COURT IN AN EARLIER CASE?

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On Writ of Certiorari to

The Supreme Court of Ohio

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OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming petitioner's conviction and death sentence was released on March 23, 1988, and is reported at 36 Ohio St.3d 1, 520 N.E.2d 568, and is accurately set out as Petitioner's Appendix A. Petitioner's Appendix B accurately sets out the opinions of the Court of Appeals, First Appellate District, Hamilton County, Ohio. The Court of Common Pleas, Hamiton County, Ohio (the trial court), rendered an opinion as well. It is set out as "Appendix A" in this Memorandum.

JURISDICTION

Petitioner's claimed jurisdiction is accurately set out in his petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved in this case are set out in "Appendix B" to this Memorandum.

STATEMENT OF THE FACTS

THE TRIAL

On February 11 or 12, 1985, petitioner and Lee Holmes were serving sentences in the Community Correctional Institution. (T.p. 467, 468) During a recreation period, petitioner told Mr. Holmes that Tracy Abernathy, who went to school with Mr. Holmes,

was not treating him well. (T.p. 4i70, 471, 472) Petitioner told Mr. Holmes that Tracy was going with some cher guy and that petitioner was going to kill him. (T.p. 474) Petitioner did not use the name of the man going with Tracy but referred to him as a "punk-assed nigger." (T.p. 473, 474)

On February 19, 1985, Tracy Abernathy was living at 2314 Nottingham in Hamilton County, Ohio. (T.p. 371, 416) She shared the two story townhouse with her two children and Kevin Flanagan. (T.p. 372) Tracy had lived with petitioner for two years prior to this time and petitioner was the father of Tracy's two children. (T.p. 367, 368) Tracy's separation from petitioner was an unpleasant experience. (T.p. 369) Prior to February 19, 1985, Tracy had no contact with petitioner for a period of six months. (T.p. 369, 370)

At 10:30 a.m. on that morning, Kevin and Tracy were awakened in their second floor bedroom by a crash from the kitchen on the first floor. (T.p. 372, 373) Kevin and Tracy started down the stairs to investigate and met petitioner three steps from the top. (T.p. 373) Petitioner had a gun and ordered Tracy and Kevin back to the bedroom. (T.p. 373, 374) Kevin Flanagan asked petitioner why he broke in. (T.p. 374) Petitioner responded by asking Kevin his name. (T.p. 374) After Kevin answered, petitioner pulled the trigger of his gun. It misfired. (T.p. 374) Petitioner aimed and pulled the trigger a second time. The gun fired and the bullet pierced Kevin's chest. (T.p. 374) Petitioner was no more than an arms length of Kevin when he fired the gun the second time. (T.p. 375) Kevin screamed and fell back on the bed. Tracy went to Kevin who said he loved her and died. (T.p. 375, 376)

Tracy got up and petitioner punched her in the eye and pulled her out of the room and down the stairs. Petitioner had Tracy get their one year old son and held them in the living room. There petitioner accused Tracy of prostituting. (T.p. 376)

In the meantime, Jacqueline Woods had observed a man trying to break into the rear of 2314 Nottingham. Later she saw the curtain and shade in disarray. Mrs. Woods called the Faye Apartment Security Force to check on the matter. (T.p. 460, 461,

465) Sergeant John Hurt of the Security Department went to the rear kitchen area of 2314 Nottingham and saw the broken window. (T.p. 404) After hearing screams from the inside, he knocked on the rear door of 2314 Nottingham. (T.p. 404, 377) Petitioner forced Tracy out the front door and put the gun in his pocket. (T.p. 377, 405) Sergeant Hurt, who did not carry any weapons while on duty, ran to the front of 2314 Nottingham. (T.p. 405, 407)

In front of the building, Sergeant Hurt approached Tracy who after a small commotion stated her boyfriend was shot on the second floor of 2314 Nottingham. (T.p. 406) Sergeant Hurt followed Tracy to the location of Kevin Flanagan's body. (T.p. 378, 399, 406) Petitioner was behind Sergeant Hurt and motioned him toward the door of 2314 Nottingham. (T.p. 406) Sergeant Hurt went into the apartment without seeing petitioner's gun. (T.p. 378, 406, 408)

At the top of the stairs, petitioner drew his gun and pushed Sergeant Hurt into the bedroom. (T.p. 406, 378, 379) Petitioner ordered Sgt. Hurt to his knees and Tracy ran to a closet. (T.p. 378, 379, 380, 406) Petitioner announced he was going to kill Tracy and Sergeant Hurt. (T.p. 415) Petitioner, at a range of eighteen inches, fired two shots at Mr. Hurt's head. (T.p. 380, 414, 406) Petitioner again pulled the trigger but the gun clicked. (T.p. 380) Sergeant Hurt received powder burns from these shots on the left temple area of his head. (T.p. 414) Petitioner left the bedroom and Sergeant Hurt pushed the bed with the body of Kevin Flanagan on it against the bedroom door. (T.p. 407) Using a two-way radio, Sergeant Hurt called the Cincinnati Police Division asking for help. (T.p. 407) Sergeant Hurt heard the petitioner reloading his gun outside the bedroom. (T.p. 416)

Petitioner forced his way into the bedroom. (T.p. 407) After pistol whipping Tracy, petitioner ordered Sergeant Hurt and Tracy out the front door. (T.p. 407, 408, 382, 381) Outside, petitioner dragged Tracy away from the apartment. (T.p. 382, 408, 424, 425) Tracy was carrying her baby and bleeding from her head. (T.p. 424, 425) A Cincinnati police cruiser appeared on the scene screeching to a halt and backing up. (T.p. 382, 425)

behind a building at 4015 President Drive. (T.p. 408, 426) Andrew Leonard observed these events and ran behind a neighboring building just in time to see petitioner throw the gun in a dumpster. (T.p. 426)

Police Officer Stephen Wong was the first to arrive on the scene and lost sight of petitioner who fled. (T.p. 484) Officer Wong saw Tracy bleeding and the body of Kevin Flanagan on the second floor of 2314 Nottingham. (T.p. 4868) Officer Wong was given petitioner's name by Tracy and a description by both Sergeant Hurt and Tracy. (T.p. 487, 488, 489) Tracy, Sergeant Hurt and Mr. Leonard positively identified petitioner as the perpetrator of these offenses. (T.p. 367, 368, 391, 392, 406, 413, 425, 430) Additionally, a shell casing found under the bed on which Kevin Flanagan died had one of petitioner's fingerprints on it. (T.p. 573, 574) The gun, Exhibit #6, was recovered by Officer Lubbe from the dumpster where Mr. Leonard saw petitioner throw it. (T.p. 509, 510, 511) William Schrand of the Coroner's Office testified that the buliet recovered from Kevin Flanagan's body was fired by Exhibit #6. (T.p. 599, 600)

Additional evidence showed that Tracy Abernathy was treated at a hospital for her injuries and received five stitches. (T.p. 389) An autopsy of Kevin Flanagan's body showed that he died from a single gunshot wound to the chest which severed a major artery leading from his heart. (T.p. 554) Other evidence showed that petitioner was arrested at his sister's home without resistance. (T.p. 518, 519, 520) Finally, Tracy testified that she did not voluntarily leave the apartment with petitioner and the kitchen window was not broken prior to 10:00 a.m. on February 19, 1983. (T.p. 382, 383)

After hearing all the evidence the jury returned a verdict finding petitioner guilty as charged.

THE SENTENCING HEARING

At the mitigating hearing four witnesses testified for petitioner. Petitioner's sister stated that petitioner was a nice person who never bothered anyone unless they did something to him first. (T.p. 727) John Davis, who knew petitioner for 19 years stated petitioner was not a trouble maker, read the bible a lot, and had a good reputation. (T.p. 732, 733) Petitioner's

grandmother also testified that petitioner was a peaceful peson and deserved mercy. (T.p. 736) Finally, petitioner's mother stated that petitioner was never in trouble until he started messing around with Tracy Abernathy. (T.p. 740)

Petitioner read an unsworn statement in which he stated that he spent 180 days in the workhouse for felonious assault and domestic violence for an incident that he described as:

> "When she came at me with a knife at her mother's house, I was just returning my son to her house. I took the knife from her, and she cut herself." (T.p. 753)

Petitioner stated he was released from the Workhouse on February 15, 1985, four days before the murder. (T.p. 753) Petitioner then stated he "didn't kill that man." (T.p. 754)

The jury considered all evidence presented and found the two aggravating circumstances to outweigh all mitigating circumstances beyond a reasonable doubt. The sentence of death was recommended.

The trial judge, in an opinion, dated June 10, 1985, analyzed all pertinent information and reached the same conclusion. The trial judge sentenced petitioner to death for killing Kevin Flanagan. The Ohio Court of Appeals and Ohio Supreme Court conducted an independent weighing of aggravating circumstances and mitigating factors and affirmed the sentence of the trial court.

REASONS FOR DENYING WRIT

I

AN APPELLATE COURT NEED NOT CONSIDER AN ERROR WHICH A PARTY COMPLAINING OF THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL, TO THE TRIAL COURT'S ATTENTION AT A TIME WHEN SUCH ERROR COULD HAVE BEEN AVOIDED OR CORRECTED BY THE TRIAL COURT.

ARGUMENT

The petitioner's primary claim of error is one which was not raised in any fashion at trial. It is, under Ohio law, waived. The Ohio Supreme Court in State v. Williams, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977) held in its syllabus paragraph 1 that:

> "1. An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of State v. Glaros, 170 Ohio St. 471, approved and followed.)"

This Court in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1584 (1982) at 124, 1570 recognized the long established Ohio waiver rule.

The only exception to the Ohio Waiver rule is the plain error rule defined in State v. Underwood, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983) as follows:

> "The failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise. (State v. Long, 53 Ohio St.2d 91 [7 O.O.3d 178], approved and followed.)"

Under this standard, the claimed error must be judged.

At trial one issue involved as a possible mitigating factor under O.R.C. 2929.04(B)(5) is the offender's lack of a significant history of prior criminal convictions and delinquency adjudications. On this issue petitioner's witnesses testified that he was with Tracy Abernathy. (T.p. 726, 727, 728, 737, 740, 745, 753) At 753 petitioner himself stated he was never in trouble with "Juvenile Court or any other court except for involvement with Tracy Abernathy." (T.p. 753)

Tracy Abernathy testified about these instances. At page 369 of the record it was as follows:

> "Q. And when you left, or when he left, or whatever, what type of a split-up was that?
>
> Was it a pleasant one, was it an unpleasant one?
>
> A. An unpleasant one.
>
> Q. Were there any problems at that time?
>
> A. Yes, because he would not leave me alone until I told him that he was finished.
>
> A. Did that result in having to call the police or become involved in the criminal justice system?
>
> Q. Yes, it did.
>
> Q. Approximately how many times did that happen?
>
> A. About five." (T.p. 369)

With this background the prosecutor made the following argument referring to Tracy Abernathy as "her":

> "And No. 7: The lack of a substantial record. Well, maybe he didn't have a juvenile record, and again you were told part of his record. But look what is consisted of. He did time in the workhouse for hitting somebody, punishing somebody. He was involved in the first trial, you heard with her, five different times. Five times he came in contact with the juvenile justice system, each escalating a little bit until he reached the big time. He got the gun, and he killed somebody. So that, again, is not a mitigating factor." (T.p. 770, 771) (emphasis added)

The petitioner claims that the prosecutor's use of the term "Juvenile Justice System" instead of "Criminal Justice System"[1] was so hideous of an error that it requires reversal.

First, this is not, as petitioner alleges, a reference to matters outside the record. Tracy testified as to the 5 contacts with some "justice system." Further, all of the statements by petitioner's witneses about him never being in trouble carried a caveat that excluded his relationship with Tracy Abernathy. petitioner's statement about not being in trouble with Juvenile Court or any court excluded his contacts with Tracy Abernathy. The prosecutor, in the same paragraph stated that there was no juvenile record. Based upon this record, the prosecutor did not during this time refer to facts outside the record. If any error occurred it was a simple misstatement.

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[1] Actually the error was probably made by the court reporter in that no one raised the matter at trial and in the same paragraph the prosecutor admits there was no juvenile record. At this late date, it is impossible for any one to swear which term was used. It should be noted that locally few people ever refer to juvenile court proceeding as the juvenile justice system.

The next question is whether such a misstatement is plain error. Because sometimes misstatements do occur, the Court before and after the argument issued a cautionary instruction regarding the content of arguments and the definition of evidence is given. In the case at bar, such an instruction is given at four different times in the record. (T.p. 622, 671, 672, 775, 780, 781) Additionally, the attorneys also stated that argument of counsel are not evidence on three occasions. (T.p. 356, 364, 658) It is submitted that the reason for such instructions is that, presumably, the jurors follow them. Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132 (1979)

In the case at bar the prosecutor in the same breath admitted no juvenile conviction and referred to Tracy Abernathy's testimony about five contacts with the juvenile justice system. Any reasonable person in view of all the cautionary instructions would not, as defense counsel does here, rush to the conclusion that the assistant prosecutor is engaging in a sinister plot to bring facts, not in the record, before the jury. The "first trial of the proceedings, in the jargon used at the trial level was the guilt phase. (T.p. 7, 777) At that trial Tracy Abernathy testified as to five contacts with the Criminal Justice System. It is submitted that any juror, following the Court's instructions, would simply conclude that the prosecutor misspoke. No reasonable person would conclude that there were 5 additional contacts with the Juvenile System. It is submitted that under the Underwood test no plain error occurred.

Further, this Court has recognized that misstatement by prosecutor is not grounds for automatic reversal. In Darden v. Wainwright, 477 U.S. _____, 106 S.Ct. 2464 (1986) at 2472 this Court set out the following test:

> "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)."

In Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), this Court stated:

> "The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed **in toto** before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly v. DeChristoforo, supra at 646, 1873.

It is submitted that this is not a repeated misrepresentation of a dramatic exhibit. Instead, all that is involved is a single misstatement which is contradicted by the prosecutor hismelf four sentences earlier. As was billed in advance not to be evidence and the court repeated and correctly instructed the jury as to the effect of argument. This claimed error in the argument did not rise to the level of a violation of due process rights.

II

THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE REVIEWING COURTS TO BE IMPREGNABLE CITIDELS OF TECHNICALITY MANDATING REVERSAL FOR EVERY CLOSING ARGUMENT OF A PROSECUTOR WHICH QUOTES THE CALMLY REASONED EXPLANATION OF THE LATE JUSTICE POTTER STEWART FOR THE DEATH PENALTY.

ARGUMENT

This Court in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974 (1983) at 509, 1980 stated:

> "Chapman reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels of technicality."'
>
> * * *
>
> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional vilations."

As stated previously, no constitutional error occurs in a closing argument unless that argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, supra. Petitioner's second claim is one which the Ohio Supreme Court found to be harmless error.

The transcript reveals that the defense counsel in his argument invoked the Beatitudes and high religious authorities in asking for a lesser sentence. He cautioned the jurors, referring to MacBeth, that they wouldn't want to be trying to wash the spots off of their hands. Finally, he told them that their verdict was the equivalent of the jurors personally killing petitioner. (T.p. 761 through 763) In response to the high religious authoriity cited by defendant, the prosecutor read a quotation from Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). Prior to the excerpt being read, the following occurred:

> "MR. PANDILIDIS: Your Honor, O[2] object to reading something out of context.
>
> THE COURT: Ladies and gentlemen, what counsel -- and we have instructed you in the other proceeding -- what counsel says now in closing argument is not the law. It is not the evidence. The evidence that you

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[2] Presumably this is an error by the court reporter. Most likely, Mr. Pandilidis said, "I object" rather than "O object."

> will consider is what you heard from the witness and, plus the exhibits. We do give them some latitude, to make reasonable inferences based on what the evidence is.
>
> With that in mind, we'll let Mr. Dinkelacker proceed." (T.p. 775)

Following the reading of the passage, no one objected. At no time was the claim made that passage was inflammatory.

The prosecutor's statement is set out in full in footnote six of the decision of the Ohio Supreme Court in petitioner's Appendix A, page 6a. Essentially in a calm rational manner the prosecutor's quotation explained that function capital punishment serves in an organized society.

The standard used by this Court in Darden v. Wainwright, supra, at 2472 is as follows:

> "Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial. The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See Darden v. Wainwright, 513 F.Supp., at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in United States v. Young, 470 U.S. ____, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole. Id., at ____, 105 S.Ct. at 1045. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence."

Here, the arguments were not an attempt to manipulate evidence and were in direct response to the petitioner's invocation of religious authority in the opening portion of the argument of his attorney. The trial court reminded the jury not to consider the quotation as either the law or the evidence.

Under the standard set out by this Court any error in the use of this Court any error in the use of this quotation was harmless error. Petitioner relies upon Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985) which dealt with the Gregg quotation in combination with quotations from an earlier Georgia case. Here, the quotation was billed in advance as NOT THE LAW. The prosecutor urged the jury to base their decision on the evidence. In his fourteen page argument, the focus of all but one page is

about whether the evidence supports any of the statutory mitigating factors. The page that does not . merely a brief response to the "Beatitutes" argument of defense counsel.

Taken as a whole, the quotation, if error at all, does not violate the standard set out in Darden v. Wainwright, supra. Any error, is harmless error. United States v. Hastings, supra.

III

A JURY INSTRUCTION WHICH ACCURATELY SCRIBES THE FUNCTION OF AN OHIO JURY IN THE SENTENCING PHASE OF A CAPITAL CASE DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

Initially this issue was not raised and therefore waived. State v. Williams, supra and Engle v. Isaac, supra.

Petitioner, in his brief, virtually concedes that the questioned jury instruction accurately reflects Ohio law. The Ohio Supreme Court in State v. Williams, 23 Ohio St.3d 16, 490 N.E.2d 906 (1986) cert. denied 107 S.Ct. 1385, veh. denied 107 S.Ct. 1966, explained the difference between Ohio law and Mississippi law as follows:

> "Under R.C. 2929.03(D)(2) and (3), the jury and the trial court each make an independent finding as to whether the aggravating circumstances outweigh the mitigating factors, thus justifying the death sentence. No Ohio court is bound by the jury's weighing of the mitigating circumstances, as opposed to the Mississippi scheme reviewed by the Caldwell court. In Mississippi the jury's verdict of death would not be overturned unless 'it "was against the overwhelming weight of the evidence," or if the evidence of statutory aggravating circumstances is so lacking that a "judge should have entered a judgment of acquittal notwithstanding the verdict,"' id., at 248, quoting Williams v. State (Miss. 1984), 445 So.2d 798, 811. We find that the jury instructions in the instant case were an accurate statement of the law and, therefore, were relevant to the valid state interest in educating the jury on the application law."

Thus, the jury instruction in the case at bar were an accurate statement of Ohio law.

Petitioner claims that this Court has never definitively decided whether such an instruction may be given. That is not accurate. In Darden v. Wainwright, 477 U.S. _____, 106 S.Ct. 2464 (1986), footnote 15 this Court stated:

> "But petitioner's reliance on Caldwell is even more fundamentally mistaken than these factual differences indicate. Caldwell is relevant only to certain types of comment -- those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should be the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process."

The instruction in the case at bar did not mislead the jury as to its role in the sentencing process.[3] Therefore, no constitutional error occurred.

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[3]Relevant portions of the jury instruction were as follows:

"You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State.

Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant will actually be sentenced to death or to life imprisonment.

* * *

In this event, you will determine which of the two possible life sentences you recommend to the Court. In this event, your recommendation to the Court shall be one of the following:

(1) That Dewaine Poindexter be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment; or (2) That Dewaine Poindexter be sentenced to life imprisonment with parole eligiblity after 30 full years of imprisonment.

You must understand that if you make one of these particular recommendations, it will be binding upon the Court, and the Court must impose the specific life sentence you recommend." (T.p. 787, 788)

IV

NEITHER THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT STATE SUPREME COURTS FROM DISPOSING SUMMARILY OF ISSUES OF LAW WHICH WERE PREVIOUSLY CONSIDERED AND DECIDED THE STATE SUPREME COURT BY SIMPLY CITING THE CASE IN WHICH THE ISSUE WAS DECIDED.

ARGUMENT

In the Opinion of the Ohio Supreme Court in this caes, the Court explained:

> "Initially, it should be noted that although R.C. Chapter 2929 requires this court to review capital cases in as certain manner, that chapter does not mandate that this court address and discuss, in opinion form, each and every proposition of law raised by the parties. While we recognize that certain issues of law must be raised to preserve a party's right of appeal in federal court, we will not reconsider and discuss such issues at length in each case. We, therefore, hold that when issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case."

The Court then applied this policy to various issues raised by petitioner. For instance, the Ohio Supreme Court decided the petitioner's third issue (Proposition of Law) as follows:

> "Appellant argues in his third proposition of law that the use of the same felony twice, to elevate the offense to aggravated murder and again to elevate it to capital aggravated murder, fails to narrow the class of offenders eligible for the death penalty. This court has rejected this argument. State v. Jenkins (1984), 15 Ohio St.3d 164, 177-178, 15 OBR 311, 322-323, 473 N.E.2d 264, 279-280. See State v. Buell, supra, at 141-142, 22 OBR at 218, 489 N.E.2d at 810-811; State v. Barnes (19868), 25 Onio St.3d 203, 206-207, 25 OBR 266, 269, 495 N.E.2d 922, 924-925; State v. Steffen, supra, at 114, 31 OBR at 275-276, 509 N.E.2d at 388. For the reasons expressed in those decisions, we adhere to that position."[4]

It is submitted that citing a previous case in which a court considered the identical claim is a permissible manner under the constitution for a State Supreme Court to dispose of an issue consistent with the due process claim of the Fourteenth Amendment.

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[4]This issue was also resolved by this Court adversely to the petitioner in Lowenfeld v. Phelps, ____ U.S. ____, 108 S.Ct. 546 (1988).

Further, there is good reason for this policy. The Ohio defense bar led by the State Public Defender's office has filed innumerable issues in briefs most of which have little if anything to do with the particular facts of the case being considered. They have not winnowed out the what from the chaff. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). In one such case State v. Spisak, 36 Ohio St.3d 80 (1988) the State Public Defender filed a brief containing 64 issues (Propositions of Law) and a total length (including reply brief and attachments) of over 900 pages.

Rather than impose an arbitrary page limitation which petitioner would claim prevented him from raising some federal issue, the Court resolved each issue (Proposition of Law) by citing the appropriate prior state or federal case resolving the issue.

In the age of word processors and with the stated goal of many members of the defense bar to force this Court to prohibit capital punishment by abuse of process and procedures, some measure of judicial ecomony is necessary. This, of course, did not short circuit the independent factual review by the Ohio Supreme Court. In conducting this function, the Court carefully reviewed the possible statutory mitigating factors and evidence presented in support of those factors and the aggravating circumstances of the murder.

Finally, it is submitted that the style in which a State Supreme Court writes its decision (as opposed to the content of the decision) is a matter which is not controlled by the Federal Courts. In Leis v. Flynt, 99 S.Ct. 698 (1978), this Court held that the Constitution does mandate the manner in which states control admission to the practice of law. Likewise, no authority has been cited by petitioner creating federal rights to the style in which a state court decision is written. If this Court were disposed to dictate style of writing decisions, this would undoubtedly lead to this Court having to write an entire procedural code for all state supreme courts mandating lengths of briefs, arguments, time for filings, and perhaps, even the amount of time each State Supreme Court Justice must spend considering each issue raised. It is submitted that the United States

Constitution does not provide for this Court to write such a procedural code.

It is submitted that no federal rights were violated in this regard.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully,

Arthur M. Ney, Jr.
Prosecuting Attorney

Christian J. Schaefer
Assistant Prosecuting Attorney

420 Hamilton County Courthouse
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

Appendix "A"

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Appendix "B"

C850394

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

STATE OF OHIO	:	CASE NO. B850757
Plaintiff	:	
-vs-	:	OPINION
DEWAINE POINDEXTER	:	Judge Norbert A. Nadel
Defendant	:	

BACKGROUND

This case originated with the filing of an indictment on March 1, 1985, against defendant, Dewaine Poindexter, charging him with Aggravated Murder in Counts One and Two of the indictment and charging him with one specification of Aggravating Circumstances as to each Count One and Count Two, thus qualifying this case as a possible death penalty case under the laws of the State of Ohio. In addition, defendant was charged with the following offenses:

In the Third Count of the indictment, defendant was charged with Aggravated Burglarly.

In the Fourth Count of the indictment, defendant was charged with Felonious Assault on Tracy Abernathy.

In the Fifth Count of the indictment, defendant was charged with Kidnapping Tracy Abernathy.

In the Sixth Count of the Indictment, defendant was charged with Attempted Aggravated Murder of John Hurt.

This opinion deals only with the Aggravated Murder charges and the specifications pertaining to said murder. It is prepared and will be filed with the First District Court of Appeals and with the Supreme Court of Ohio in compliance with the requirements of O.R.C. §2929.03(F).

Since the date of the subsequent arraignment, the docket sheet reflects an extensive process of trial preparation. Numerous motions were filed before and during trial. They were heard and ruled upon during the course of the pretrial preparation, during the course of the guilt or innocence trial and the sentencing proceeding. All rulings on said mtions are reflected either on the docket sheet of the case, directly on the face of the motion or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of defendant, Dewaine Poindexter, commenced on May 9, 1985, with the process of jury selection from a special venire of one hundred (100). On May 10, 1985, the jury was impaneled and sworn. The jury finally selected consisted of twelve regular members and three alternates. On the regular panel of the jury, there were eight women and four men. One of the alternates had to be used as one of the regular panel members became ill between the first trial and the sentencing proceeding. The Court elected to retain the remaining alternates until the regular panel was finally discharged in order to assure that no mistrial might have to be declared while the regular panel was deliberating on the sentencing recommendation if then a member of the regular panel should become ill or need to be excused because of some other personal reason.

On May 13, 1985, the State commenced its case and produced evidence on the charge of Aggravated Murder as set forth in Counts One and Two of the indictment, evidence as to each of two specifications of Aggravating Circumstances as to the First and Second Count, and evidence on the other four Counts in the indictment. During the course of the guilt or innocence trial, the State of Ohio presented twelve (12) witnesses and the defense rested without calling a single witness.

There was absolutely no doubt that Dewaine Poindexter was the perpetrator of the murder of Kevin Flanaghan as well as the other offenses charged in the separate Counts of the indictment.

After receiving instructions of law from the Court which were applicable to the guilt or innocence issue in the first trial and upon due deliberation, the trial jury did, on May 15, 1985, find defendant guilty of Aggravated Murder as charged in the First and Second Counts of the indictment, and also found defendant guilty of the two specifications contained in the indictment as they pertain to the First and Second Counts. In addition, the jury found the defendant guilty of the other separate Counts of the indictment as charged.

The Aggravating Circumstances which defendant, Dewaine Poindexter, was found guilty of committing were:

(1) Defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan, while the defendant was committing the offense of Aggravated Burglary.

(2) Defendant, Dewaine Poindexter, committed the offense of the Aggravated Murder of Kevin Flanaghan as part of a course of conduct involving the purposeful killing of Kevin Flanaghan and the attempt to kill John Hurt, and the said Dewaine Poindexter was the principal offender in the Aggravated Murder of Kevin Flanaghan and the said Dewaine Poindexter was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

Before receiving and reading the jury's verdict in open court, the Court allowed the alternate jurors, who were sequestered separately, to fully examine the exhibits admitted into evidence. This was done in order to assure that the alternate jurors had seen and heard exactly the same evidence the regular jurors had before it in reaching their verdict, so that if an alternate juror had to be pressed into service in the sentencing proceeding, that alternate juror could join the deliberative process with exactly the same exposure to evidence as the regular jurors.

SENTENCING PROCEEDINGS

On May 20, 1985, the second state of this matter, hereinafter referred to as the Sentencing Proceedings commenced, pursuant to O.R.C. §2929.03(D).

It should be noted that all of the jurors were sequestered during their deliberations on guilt or innocence and their deliberations on the sentencing proceedings.

At the sentencing proceedings, the Court reversed the traditional trial procedure ordering defendant to proceed first. This reversal of procedure did not, in any way, alter the burden of proof placed upon the State, as the instructions of the Court indicated. The original trial jury, with the addition of the one alternate juror who replaced the juror who became ill, heard additional testimony and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death.

After receiving the instructions of the Court as to the applicable law in the sentencing proceedings, and upon due deliberation, the trial jury, on May 20, 1985, returned its verdict and found, unanimously, that the State of Ohio proved by proof beyond a reasonable doubt, that the Aggravating Circumstances which defendant, Dewaine Poindexter was found guilty of committing, were sufficient to outweigh the mitigating factors in this case. The jury recommended in its verdict that the sentence of death be imposed as mandated by provisions of ORC. §2929.03(D)(2).

The Court then discharged all the jurors and continued the case until June 7, 1985, in order to personally review the numerous exhibits and testimony before imposing sentence.

IMPOSITION OF SENTENCE PROCEEDINGS

On June 7, 1985, the Court proceeded to impose sentence pursuant to O.R.D. §2929.03(D)(3). On that same date, the Court announced that its written opinion would be filed within fifteen (15) days as required by O.R.C. §2929.03(F).

This Court found by proof beyond a reasonable doubt, upon a review of the relevant evidence in both trials, the testimony, exhibits, arguments of respective counsel, that the Aggravating Circumstances which defendant, Dewaine Poindexter, was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on June 7, 1985, this Court imposed the sentence of death upon defendant, Dewaine Poindexter, ordering said execution to take place on September 6, 1985.

OPINION

The provisions of O.R.C. §2929.03(F) now require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors specifically enumerated in O.R.C. 2929.04(B) or the existence of any other mitigating factors, and also requires the Court to state reasons why the Aggravating Circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating factors, since that is what the Court has in fact found by imposing the death penalty. In other words, the Court must put in writing the justification for its sentence.

In meeting its responsibility under the statute, the Court will review all mitigating factors described in O.R.C. §2929.04(B) as well as any other mitigating factors raised by defendant and will indicate what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to other requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death, and

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The Court will first, however, review the Aggravating Circumstances which defendant has been found guilty of committing and will indicate why the jury's conclusions on these matters were correct.

AGGRAVATING CIRCUMSTANCES

The Aggravating Circumstances that the defendant, Dewaine Poindexter, was found guilty of committing are as follows:

(1) The defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan, while the defendant was committing the offense of Aggravated Burglary.

(2) Defendant, Dewaine Poindexter, committed the offense of the Aggravated Murder of Kevin Flanaghan, as part of a course of conduct involving the purposeful killing of Kevin Flanaghan and the attempt to kill John Hurt, and the said Dewaine Poindexter was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

In deliberating upon its decision in this case as required by O.R.C. §2929(3)(D), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at both trials, the testimony, other evidence, and the arguments of respective counsel, all of which had been available to the jury in its deliberation at various stages of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the two trials and which are part of the transcript. The evidence and testimony were tested by the Court from the viewpoint of credibility and relevancy to the existence of Aggravating Circumstances along with their qualitative and quantitative measure.

In the guilt or innocence trial at which the defense did not call a single witness in the sentencing proceedings in which defendant called witnesses and made an unsworn statement, counsel in argument to the jury, there was never a doubt in any respect that defendant was the principal perpetrator of the offenses charged in the First and Second Count of the indictment. A complete review of the evidence pertaining to Count One and Count Two and the specifications of Aggravating Circumstances as to Counts One and Two and the other Counts reveals to this Court, beyond any doubt, that the murder of Kevin Flanaghan, as well as the offenses charged in the other Counts of the indictments, were committed by the defendant, Dewaine Poindexter and by he alone.

Additionally, the evidence showed that on the morning of February 19, 1985, Tracy Abernathy was living in an apartment with Kevin Flanaghan. On that date, Dewaine Poindexter, in possession of a .32 caliber gun, broke a rear window and entered Tracy Abernathy's apartment. Tracy Abernathy and Kevin Flanaghan, sleeping upstairs and

awaken by the noise of the broken window, began to come down the steps inside the apartment. As they ascended the steps, Poindexter turned his firearm toward the two of them and backed them upstairs into a bedroom. Shortly thereafter, Poindexter fired the gun and hit Mr. Flanaghan in the right side of the chest. He fell back on the bed and was dead within a couple of minutes.

Further, the evidence showed that John Hurt, a security guard at the apartment complex, arrived at the Abernathy apartment and walked into this situation. Poindexter turned the gun on Mr. Hurt, and with the gun in hand, took John Hurt, who was unarmed at the time, and Tracy Abernathy back again into the bedroom where Mr. Flanaghan was lying dead. With Mr. Hurt on his knees, two shots were fired at him, within a couple feet, by Poindexter. One came so close to the side of Mr. Hurt's head that he had a powder burn on the side of this head. The third time the trigger was pulled, it clicked, nothing happened. Poindexter than retreated from the bedroom.

It was, therefore, the Court's conclusion, upon a full and complete review of all the relevant evidence, that there was proof beyond a reasonable doubt that defendant, as the principal offender, committed the offense of the Aggravated Murder of Kevin Flanaghan while the defendant was committing the offense of Aggravated Burglary.

The Court also found upon a full and complete review of all of the relevant evidence that there was proof beyond a reasonable doubt that defendant committed the offense of the Aggravated Murder of Kevin Flanaghan and defendant was the principal offender in the Aggravated Murder of Kevin Flanaghan and defendant was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

MITIGATING FACTORS

The Court will now review all possible mitigating factors indicating whether or not they were present and if so what, if any, consideration the Court gave to them. Those listed in O.R.C. §2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The Court finds no evidence to suggest that Kevin Flanaghan in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that offender was under duress, coercion, or strong provocation." Again, the Court finds absolutely no evidence of any nature that would suggest that the defendant was under duress, coercion or strong provocation. This factor was not present.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Again, the Court finds no evidence to suggest that defendant suffered from a mental disease or defect.

(4) "The youth of the offender". The Court finds that defendant was, at the time of the offense, 23 years of age. There was no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death.

(5) "The offender's lack of a significant history of prior criminal conviction and delinquent adjudications." The record in this case indicates two previous convictions for criminal offenses of

violence as an adult wherein the victim in both offenses was Tracy Abernathy. Therefore, the Court would deem it inappropriate to give the defendant any consideration pursuant to mitigating factor number five.

(6) "If the offender was a participant in the offense but not the principal offender the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim." The Court finds in this case that defendant was the principal offender, therefore, this mitigating factor is not present.

The Court now reviews the remaining possible mitigating factors enumerated in O.R.C. §2929.04(B). These two remaining possible mitigating factors are closely interrelated and will be reviewed as interrelated.

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death." and,

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The nature and circumstances of this offense appear clear to the Court. Therefore, it will not be this Court's intention to reiterate in this opinion each and every detail of the murder of Kevin Flanaghan or the other offenses committed by defendant.

It is quite clear that on February 19, 1985, the victim Kevin Flanaghan, and Tracy Abernathy, were living together at the Fay Apartments, 1314 Nottingham Drive. They were living there with Tracy Abernathy's two young children. At the time that they were living together, Dewaine Poindexter was not living with Tracy Abernathy, although he had lived with her before. The two children Tracy had were Dewaine Poindexter's two children. They had been broken up for approximately a year.

At about 10:30 the morning of February 19, 1985, defendant went to the apartment of Tracy Abernathy, went to the back window and broke in the glass window, and entered her apartment. When he entered that apartment, he had a .32-caliber - Smith & Wesson gun. In the apartment, Kevin Flanaghan and Tracy Abernathy were sleeping upstairs. They heard the noise and came downstairs to see what was going on. As they got partway down the steps, the defendant turned his firearm towards the two of them and backed them upstairs into a bedroom.

In the bedroom, Dewaine Poindexter aimed the gun straight towards Mr. Flanaghan and as Mr. Flanaghan backed away and sat on the bed, defendant pointed the gun at Kevin Flanaghan and clicked it one time. The gun did not fire at this point. Poindexter then fired the gun and hit Mr. Flanaghan in the right side of the chest. Kevin Flanaghan fell back on the bed, and was dead within a couple of minutes. Shortly thereafter, defendant forcibly took Tracy Abernathy at gunpoint out of that room, after she had hugged Mr. Flanaghan for the last time. One of the small children was in the house at the time.

The proven facts of Aggravating Circumstances reveal a cruel, willful and cold-blooded disregard for human life and values.

At the sentencing hearing, friends and relatives of the defendant testified and could offer no explanations for the violent acts committed by Dewaine Poindexter in this case. There was no testimony addressed during these proceedings that any childhood experiences of

defendant resulted in any emotional scarring of the defendant which could have later shown up and perhaps explain his behavior with reference to this case.

And, finally, the defendant in his unsworn statement to the jury said:

"...I have a love for my family and a love for my children very much.

Tracy's mother always refused to let me see my children.

While I was in jail, Tracy was hanging out in bars and my children were neglected.

She turned the children over to the welfare department and four days later went back and got them.

When we lived together, she was a good mother. When I wasn't there, she was not, and the children were neglected.

I am a religious person, and I believe in raising the proper family. I don't believe in violence. I don't use profanity, drugs or alcohol. I don't believe in it.

I have always been taught to respect others, and I have always respected others.

I believe in the Bible and I read it religiously.

I believe very highly in God and always try to live a good and decent life.

And the main thing, I didn't kill that man."

The evidence is overwhelmingly contrary to this last assertion by defendant.

CONCLUSION

The sole issue which confronted the Court is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, DEWAINE POINDEXTER WAS FOUND GUILTY OF COMMITTING, OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard, all of the statutory mitigating circumstances a all other possible mitigating factors raised by counsel have now bee reviewed and discussed. The same has been done with the Aggravating Circumstances.

Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention b defense counsel in any manner and after considering fully the Aggravating Circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the Aggravating Circumstances do outweigh all the mitigating factors advanced by defendant, Dewaine Poindexter, beyond a reasonable doubt as required O.R.C. §2929.03(D)(3).

For all the above stated reasons, the recommendation of the tria jury was adopted and the sentence of death was imposed upon the defendant, Dewaine Poindexter, on June 7, 1985.

DATE: June 10, 1985

Norbert A. Nadel, Judge